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No. 88-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHENIX FEDERAL SAVINGS & LOAN ASSOCIATION, F.A.
Petitioner,

—v.—

SHEARSON LEHMAN HUTTON INC.
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Should this Court review the Eighth Circuit's affirmance of the District Court's denial of a Rule 59 motion to amend the judgment or, in the alternative, for a new trial, when (i) the Court of Appeals considered the merits independently of the jury instructions and ruled on the basis of the applicable state law; (ii) in any event, Phenix failed to preserve its legal issues for review and invited the purported error about which it complains; and (iii) there is no conflict among the circuits with respect to the circumstances under which a party may raise an issue by post-trial motion following its failure to object to jury instructions?

(2) Should this Court review a decision of the Eighth Circuit that the plain error exception to Federal Rule of Civil Procedure 51 did not require reversal of the judgment when the Eighth Circuit applied the exception properly and in the same manner as all the circuit courts that recognize the exception?

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent Shearson Lehman Hutton Inc. ("Shearson")[1] respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case. As Shearson will demonstrate, there is no good reason to grant the writ in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 856 F.2d 1125 (1988) and has been reprinted in the appendix to the petition. P.A. 1.[2]

[1] Pursuant to this Court's Rule 28.1, Shearson's corporate parents, affiliates, and non-wholly owned subsidiaries were listed in Louis A. Craco's letter to the Court dated December 30, 1988.

[2] The following abbreviations are used in this brief: P.A. for Petitioner's Appendix, Cert. Pet. for Petition for Certiorari, and R.A. for Respondent's Appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

At issue on this petition for a writ of certiorari are the Seventh Amendment to the United States Constitution, U.S. Const. amend. VII, and Rules 51 and 59 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 51 & 59.

STATEMENT OF THE CASE

A. The Original Loan and Subsequent Advances

In March 1981, Phenix Federal Savings & Loan Association, the predecessor-in-interest of petitioner Phenix Federal Savings & Loan Association, F.A. (collectively "Phenix"), lent $1.6 million to Van Buren County Alcohol, Inc. ("VBCA") as interim construction financing for an ethanol plant in Iowa. VBCA executed a demand promissory note and a mortgage on the plant in favor of Phenix. By late 1981, Phenix learned that Shearson Loeb Rhoades, Inc., the predecessor-in-interest of respondent Shearson, had refused to provide permanent financing to VBCA. In May 1982, Phenix commenced an action against Shearson in the United States District Court for the Southern District of Iowa, initially claiming $1.6 million in compensatory damages.

After learning that Shearson would not provide permanent financing, Phenix continued to fund the plant's operations rather than foreclosing on its first mortgage, notwithstanding that the plant had a market value at the time of $6.5 million, substantially more than the indebtedness of $1.6 million. From early 1982 through late 1984, Phenix provided VBCA with additional loans of more than $3.7 million.

B. The MTJ Bond Transaction

By late 1984, the principal amount of VBCA's indebtedness to Phenix had risen to $5,347,496. With interest,

the total was $7,241,061. At that time, Phenix decided to participate in a transaction whereby VBCA transferred ownership of the ethanol plant to MTJ, Inc. ("MTJ"), a newly created corporation, and the city of Bonaparte, Iowa sold $7.795 million in tax-exempt bonds for the purpose of financing the plant. Of the bond proceeds, $6.5 million was used to repay VBCA's indebtedness to Phenix, while the remainder was used to improve the plant and to cover the costs of financing. MTJ was primarily liable to repay the bond interest and indebtedness and Phenix guaranteed MTJ's repayment. The transaction (the "MTJ bond transaction") closed on December 27, 1984. Thus, when trial began in the District Court in January 1985, Phenix had been repaid the entire principal amount of its loans to VBCA, but faced contingent liability on its guarantee of the MTJ bond obligation.

C. The Trial

At trial, the damages sought by Phenix included not only $1.6 million for the initial loan and more than $5 million for subsequent loans and interest, but also $7,945,263, representing the full amount of its guarantee in the MTJ bond transaction, and a variety of other damages. As the Court of Appeals noted: "Phenix claimed the risk it faced in this deal as an element of consequential damages for which Shearson was responsible, and it asked the jury to determine how much it would likely lose on the letter of credit and award it that sum. The [District] Court accepted this theory. . . ." P.A. at 8.

Thus, the MTJ bond transaction, and the extent of Phenix's contingent liability on its guarantee, were put at issue by Phenix in an effort to maximize its potential recovery. In implementing this trial strategy, Phenix was the first party to bring the MTJ bond transaction to the jury's attention, in counsel's opening statement, R.A. at 6, and later introduced evidence designed to show that the ethanol plant would not likely be profitable, *id.* at 19. For its part, Shearson introduced projections prepared by Phenix's own accountant that the plant would produce sufficient revenue to cover principal and interest payments on the MTJ bonds. *Id.* at 18.

With Phenix seeking to recover consequential damages as a result of its contingent liability on the MTJ bonds, the District Court assigned to Phenix the burden of proving its entitlement to recover such damages, just as it had assigned to Phenix the burden of proving its other damages. *See* R.A. at 24-25. In addition, the Court determined that because Phenix sought to recover damages stemming from this contingent liability, the $6.5 million realized by Phenix in the MTJ transaction must be subtracted from any damages it might be awarded in order to prevent duplicative recovery. This approach was embodied in Instruction No. 41 to the jury, the text of which appears in the Eighth Circuit's opinion in this case. P.A. at 8-9.[3]

Having invited this approach by the way in which it framed its damage claims, Phenix naturally failed to interpose any objection to Instruction No. 41. Instead, Phenix repeatedly expressed its full agreement with the $6.5 million set-off. Responding to Shearson's motion for a directed verdict, counsel for Phenix told the District Court: "[Y]ou've already subtracted, *which we fully agree with,* the six and a half million." R.A. at 6 (emphasis added). Counsel for Phenix reiterated this point three times during summation. First, he told the jury that "the damages which we are claiming, totals $20,600,324.57, and from that figure the Court will instruct you that you're not

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[3] In substance, the District Court informed the jury that a damages award could include any payment Phenix established it would be required to make over the life of the bonds for which it would not be reimbursed, but that the Court would reduce any award by the $6.5 million that Phenix had admittedly received in the transaction. The Court specifically advised the jury that Phenix would recover nothing if its total damages prior to the offset were less than $6.5 million.

The Court also submitted to the jury, without objection by Phenix, Special Interrogatory No. 6, which asked:

> Has Phenix Federal established by a preponderance of the evidence it [sic] claim for CONTINGENT LOSS CONSISTING OF THE AMOUNT OF PRINCIPAL AND INTEREST ON THE MTJ BONDS THAT PHENIX FEDERAL WILL PAY FOR WHICH IT WILL NOT BE REIMBURSED UNDER THE GUARANTEES OR THE PLANT MORTGAGES, REDUCED TO PRESENT VALUE[?]

to consider the fact that he will subtract from this figure, *and we fully agree with this calculation.*" *Id.* (emphasis added). Second, he said that "the Court will instruct — *which we agree with this instruction,* will subtract $6.5 million from that which represents the money that we have received in the bond transaction." *Id.* (emphasis added). Finally, in his rebuttal summation, counsel for Phenix stated: "When you look on the board, those are the figures which reflect our damages as they are today when you must consider them, and they total the 19 million, as I have stated; *and when the Judge subtracts, as he will instruct you he will do, the 6.5, you will have the figure that we say we're damaged today.*" *Id.* (emphasis added).

The jury awarded Phenix $5,148,554 on theories of negligent misrepresentation and promissory estoppel. The jury also determined, by answering Special Interrogatory No. 6, *see supra* note 3, in the negative, that Phenix had not met its burden of proving it would be required to expend any funds on its contingent guarantee in the MTJ bond transaction for which it would not be reimbursed. The District Court then subtracted the $6.5 million Phenix received in the MTJ bond transaction, as Phenix had previously agreed was appropriate.

D. Post-Trial Motions

Once the jury returned a verdict that did not meet Phenix's expectations, however, Phenix did an about-face. In its motion to amend the judgment or for a new trial, pursuant to Federal Rule of Civil Procedure 59, Phenix argued to the District Court, *inter alia,* that the $6.5 million offset was improper. Shearson responded, among other things, that there had been no error in the assessment of damages. *See* R.A. at 26-31. The District Court denied Phenix's motion. P.A. at 47.

E. The Appeal to the Eighth Circuit

On appeal to the Eighth Circuit, Phenix argued that the District Court had erred, under the Iowa law of damages, in admitting evidence of proceeds from the MTJ bond transaction[4] and in offsetting those proceeds against the jury's damage

[4] The petition for certiorari does not challenge the District Court's evidentiary ruling.

award. *See* R.A. at 1. Phenix made a number of arguments on appeal that it had not made in its Rule 59 motion as to why it claimed the offset was improper under state law.[5]

In addition, Phenix introduced an alternative argument it had not made in its post-trial motion: even if the MTJ bond transaction was relevant, the District Court had misallocated the burden of proof under Iowa law when it required Phenix to prove how much it could be expected to lose on the transaction. *Id.* at 2. Phenix conceded that the purported misallocation of the burden of proof could not be reversed on appeal unless there had been plain error, since there had been no objection to the allocation at trial. *Id.*

Shearson argued to the Eighth Circuit, among other things, that the District Court had correctly applied the law of Iowa in applying the $6.5 million offset and allocating the burden of proof. *Id.* at 10-22. Shearson also argued that Phenix was precluded from challenging the judgment on the alternative grounds that the jury instructions including the offset and the allocation of the burden of proof had been invited by Phenix as a result of tactical positions it took at trial, its express encouragement of and agreement with the instructions, and its failure to object to the instructions. *Id.* at 3-10.

On March 10, 1988, the Eighth Circuit filed an opinion affirming the judgment of the District Court. *Phenix Federal Savings & Loan Ass'n, F.A. v. Shearson Loeb Rhoades, Inc.*, No. 86-1407 (8th Cir. Mar. 10, 1988). Phenix thereafter filed a petition for rehearing and suggestion for rehearing en banc. On May 3, 1988, the Eighth Circuit denied Phenix's petition for rehearing en banc. In an order dated September 9, 1988, the Eighth Circuit also denied Phenix's petition for rehearing by the panel but simultaneously issued a slightly revised opinion.

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[5] For example, in its petition Phenix refers to its argument that the $6.5 million offset was improper because it "was not reasonably certain." Cert. Pet. at 9. This argument was not made in Phenix's Rule 59 motion.

The September 9 opinion rejected Phenix's arguments, stating in part:

> [U]nder the applicable law Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million. The jury found that Phenix had lost over $5 million on the loan to Van Buren County Alcohol, but had not proved that it would lose anything on the letter of credit. Therefore Phenix got exactly what it was entitled to.
>
> Only if the statement of the applicable law contained in the jury instruction Phenix now complains of were egregiously wrong, and that statement produced a result substantially different from what would have resulted from a correct instruction, would we find plain error in this civil case. This did not happen here. The instruction at issue was, at worst, arguable, and it resulted at least in part from Phenix's own tactical position at trial.

P.A. at 11.

REASONS FOR DENYING THE WRIT

Phenix's petition makes two arguments: first, the Court of Appeals erred in permitting Instruction No. 41 to bar post-trial review of the $6.5 million offset; and, second, assigning to Phenix the burden of proving damages stemming from the MTJ bond transaction was plain error. As to both issues, Phenix maintains that there is a split among the circuits requiring resolution by this Court.

Phenix's first point rests on the erroneous premise that the Eighth Circuit treated Instruction No. 41 as the law of the case for purposes of post-trial motions. In fact, the Court of Appeals considered and rejected Phenix's argument that the offset was improper. Moreover, contrary to Phenix's suggestion, there is no confusion or lack of uniformity among the federal courts as to how the failure to object to jury instructions should affect post-trial motions. In cases in which a trial court erred in denying a motion for a directed verdict, failure to object to a jury charge will not bar post-verdict review. Although the

Court of Appeals did not treat Instruction No. 41 as the law of the case, neither its prior precedents nor the decisions from other courts of appeals entitled Phenix to the broad review on the merits that it received. Unlike cases in which a party moved for a directed verdict, but failed to object to jury instructions, Phenix did not preserve an objection to the offset ruling in any manner. To the contrary, Phenix invited that ruling and then expressly approved it. Finally, if the Eighth Circuit did depart from its precedents on the review of post-verdict motions, the mere intra-circuit conflict does not merit review by this Court.

As to Phenix's second point, there is similarly no need for intervention by this Court. First, there is no significant split among the circuits on this issue. The Eighth Circuit, in this case and others, is in the mainstream of plain error jurisprudence. Any disagreement among the circuits is irrelevant to the result below and insufficiently serious to warrant review by this Court. Second, contrary to Phenix's suggestion, the Eighth Circuit did not abrogate the plain error exception in this case. Instead, it applied the exception properly under the facts presented here. Finally, even if the Eighth Circuit erred in its application of the plain error doctrine, there is no reason to grant the writ, since this Court is not primarily concerned with the correction of error.

I.

THIS CASE DOES NOT REFLECT A NEED FOR GUIDANCE FROM THIS COURT ON THE RELATIONSHIP BETWEEN JURY INSTRUCTIONS AND POST-TRIAL MOTIONS.

Phenix contends that "both the district court and the court of appeals held that by failing to object to [Instruction No. 41], Fed.R.Civ.P. 51 precluded consideration of the propriety of the $6.5 million offset — at the appellate level and at the trial level under Fed.R.Civ.P. 59." Cert. Pet. at 13. More generally, Phenix argues that "[t]his case dramatizes a general confusion in the lower courts on the relationship between jury instructions and post-verdict motions." *Id.* Phenix is incorrect on both counts.

In the first place, contrary to the essential premise of Phenix's petition, the Eighth Circuit never determined that Instruction No. 41 was the law of the case. Instead, the Court of Appeals considered and rejected the merits of Phenix's argument and in so doing went well beyond what it was required to do under the circumstances of this case.

Specifically, the Court of Appeals stated: "[*U*]*nder the applicable law* Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million." P.A. at 11 (emphasis added).[6] The Court of Appeals thus decided, as Shearson argued, that the offset was proper under Iowa law and did not confine itself to Phenix's failure to object.

Furthermore, contrary to the other basic premise of the first point of Phenix's petition, there is no lack of consensus among the federal courts of appeals "as to what role the failure to object to jury instructions should play in post-verdict motions," Cert. Pet. at 16. As the cases cited by Phenix demonstrate, this issue has most often arisen when a party who has moved for a directed verdict that has been denied subsequently fails to object to jury instructions. While Phenix suggests that the federal courts of appeals have taken three different approaches on the issue, the cases cited in Phenix's petition and many others demonstrate remarkable uniformity among the circuits. They hold that when determining whether a trial court erred in denying a motion for a directed verdict, it is the applicable law — and not what the trial court announces in its instructions to be the law — that controls.

The Eighth Circuit has been in the vanguard, and remains in the mainstream, on this issue, going back to *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953). In *Coca Cola*, the defendant contended that the trial court erred in denying a motion for directed verdict and permitting the case to go to the jury. The plaintiff responded

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[6] Although the Court of Appeals stated that it did "not need to reach" Phenix's legal arguments, P.A. at 10, it is clear that the Court did not rest its decision on the procedural default and in fact did reach the merits.

that the jury instructions, to which there had been no objection, became the law of the case and foreclosed review of the sufficiency of the evidence. The court disagreed:

> [I]n determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court must ascertain for itself what the applicable law is, whether the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always *preserve for review* the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury.

Id. at 862 (emphasis added); *accord Wilson v. Sears, Roebuck & Co.*, 757 F.2d 948, 953 (8th Cir. 1985) (district court appropriately granted defendant's motion for judgment n.o.v., notwithstanding prior inconsistent jury charge), *cert. denied*, 474 U.S. 1059 (1986); *Johnson v. United States*, 434 F.2d 340, 342-43 (8th Cir. 1970) (motions for directed verdict and judgment n.o.v. should have been granted, notwithstanding government's failure to object to jury charge).

The Eighth Circuit's rule in *Coca Cola* has been quoted and followed by other circuits to consider the issue. *See, e.g.*, *Rakovich v. Wade*, 850 F.2d 1180, 1203 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 497 (1988); *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812, 825-26 n.17 (2d Cir. 1984); *Aspen Highland Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1517-18 (10th Cir. 1984) (defendant's motions for directed verdict preserved opportunity to challenge sufficiency of evidence under truly controlling law, notwithstanding failure to object to jury charge), *aff'd*, 472 U.S. 585 (1985);[7] *Dual*

[7] *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471 (10th Cir. 1985), cited by Phenix, Cert. Brief at 16, is not contrary to the *Coca Cola* principle, or to the Tenth Circuit decision in *Aspen Highland*. In that case, Firestone moved for a directed verdict, claiming that warehouse agreements containing an integration clause superseded certain letters on which the counterclaimants relied. The Court of Appeals determined that the motion for a directed verdict was properly denied because the issue of whether the letters formed

Manufacturing & Engineering, Inc. v. Burris Industries, Inc., 619 F.2d 660, 661-63 (7th Cir.) (en banc) (issue of obviousness preserved for appellate review, despite failure to object to jury charge, because of motion for judgment n.o.v.), *cert. denied*, 449 U.S. 870 (1980); *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 65-66 (5th Cir. 1972) (failure to object to jury charge does not become law of case for purposes of review of denial of motion for directed verdict).[8] There is simply no conflict among the circuits. The circuits that have addressed the issue have held that failure to object to a jury charge does not preclude a grant of a motion for judgment n.o.v.[9]

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an agreement separate from the warehouse agreements raised a question of fact for the jury. Notwithstanding the factual question whether the warehouse agreements precluded reliance on the earlier letter agreements, Firestone submitted no instructions on the issue. Instead, Firestone, without objection, permitted the jury to be instructed that the existence of the letter agreements was admitted. Firestone therefore could derive no benefit from the *Coca Cola* line of cases, because its motion for a directed verdict was properly denied and did not preserve the issue it sought to raise on appeal.

[8] This Court, too, has endorsed this rule. *See City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 922 (1988) (plurality opinion) (failure to object to jury instruction does not render instruction "law of the case" for purposes of appellate review of denial of directed verdict or judgment n.o.v.).

[9] Phenix also relies upon two cases that are very fact-specific and presented important substantive questions of federal law. These cases clearly do not support the granting of relief in this case. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court held that municipalities were immune from punitive damages in actions brought under 42 U.S.C. § 1983. The Court noted that while Newport had failed to object to the punitive damages instruction at trial, the district court had gone beyond the procedural default to consider the merits when it denied Newport's motion for a new trial. 453 U.S. at 253-55; see *Elwood v. Pina*, 815 F.2d 173, 176 (1st Cir. 1987). In light of the district court's treatment of the merits, this Court likewise reached the merits of the important federal issue presented. *See* 453 U.S. at 256; *accord Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 108 (2d Cir. 1988) (reaching merits of whether punitive damages were available under Lanham Act because, among other things, district court had reached this important and novel legal issue).

Although the Court of Appeals reviewed Phenix's challenge to the offset, it was not required to do so under its prior precedents or the law of any circuit. Phenix failed to show any plausible entitlement to post-trial relief under the circumstances here, which are fundamentally different from those present in the *Coca Cola* line of cases upon which Phenix principally relies. In those cases, the party who had failed to object to the instructions had informed the district court of and had preserved its position by moving for a directed verdict in the manner contemplated by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 50(b). In the absence of a motion for a directed verdict, denial of any post-trial relief from the erroneous jury instructions would have been mandated.

Under the *Coca Cola* line of cases, Phenix's failure to preserve its legal position in any manner was itself a sufficient ground for denial of post-trial relief. Here, however, there was a further basis for denial of the Rule 59 motion, since Phenix affirmatively invited the purported error about which it now complains. As found by the Court of Appeals, the alleged error "resulted at least in part from Phenix's own tactical position at trial." P.A. at 11. In an effort to increase its potential recovery, Phenix made the tactical decision to claim "the risk it faced in this deal as an element of consequential damages for which Shearson was responsible, and it asked the jury to determine how much it would likely lose on the letter of credit and award it that sum." *Id.* at 8. Having taken this position, Phenix necessarily accepted the offset — a concept that it expressly approved on four occasions during the trial. Phenix has cited no authority that would support the granting of Rule 59 relief under these circumstances, much less conflicting authority among the circuits on the question.[10]

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[10] Phenix relies upon *Hutches v. Renfroe*, 200 F.2d 337 (5th Cir. 1952). Cert. Brief at 22. *Hutches*, however, does not implicate Rule 51 or the jury function in any way, since it was tried without a jury. 200 F.2d at 338.

Similarly, *Solomon v. United States*, 276 F.2d 669 (6th Cir.), *cert. denied*, 364 U.S. 890 (1960), cited by Phenix, Cert. Brief at 19-20, is distinguishable. Although the Sixth Circuit permitted the defendants to raise a legal issue on a motion for a new trial where an instruction based upon the wrong statute had been given inadvertently, it held that the district court had properly denied the motion. 276 F.2d at 674.

Where, as here, a party, through its tactical positions or other conduct, has invited or induced the purported error about which it complains, the courts of appeals have held that the error may not be raised on appeal. For example, in *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985), both parties requested a jury instruction that the plaintiff need prove its case by a preponderance of the evidence. On appeal, the defendant urged reversal on the ground that the correct burden of proof was "clear, unequivocal, and convincing evidence." He argued that his failure to object to the charge should be excused under the plain error exception. *Id.* at 727. The court rejected this contention:

> We are reluctant to review this issue even on plain error grounds. Hester not only failed to object to the court's burden of proof instruction, *see* Fed.R.Civ.P. 51, but submitted the preponderance of the evidence standard in three of his requested instructions. Thus, we need not search for plain error, for it is "fundamental that where the defendant 'opened the door' and 'invited error' there can be no reversible error."

Id. (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)); *accord, e.g., Rakovich v. Wade*, 850 F.2d 1180, 1203 (7th Cir.) (en banc) (where party proposes jury instruction, he cannot complain of error), *cert. denied*, 109 S. Ct. 497 (1988); *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 778-79 (8th Cir. 1988) (plaintiff barred by invited error doctrine from challenging finding of joint and several liability since plaintiff contended that defendants jointly and severally infringed copyright); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295-96 (7th Cir. 1987) (failure to object to instruction as part of "trial strategy" not excused by plain error doctrine); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (party who requests instruction invites any error contained therein and, absent objection before submission to jury, waives appellate review of its correctness); *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n.4 (11th Cir. 1985) (cardinal rule of appellate review that party may not challenge ruling or other trial proceeding he invited); *All American Life & Casualty Co. v. Oceanic Trade Alliance*

Council International, Inc., 756 F.2d 474, 479-80 (6th Cir.) (where injection of evidence is attributable to action of party seeking to exclude evidence, invited error doctrine applies), *cert. denied*, 474 U.S. 819 (1985); *Weinar v. Rollform Inc.*, 744 F.2d 797, 805 (Fed. Cir. 1984) (invited error doctrine bars challenge to admissibility of testimony elicited by party's cross examination in absence of motion to strike), *cert. denied*, 470 U.S. 1084 (1985); *Computer Systems Engineering, Inc. v. Qantel Corp.*, 740 F.2d 59, 64 (lst Cir. 1984) (defendant could not invite error by requesting jury instructions based on statement of law it would later challenge on appeal); *Dubose v. Kansas City Southern Railway*, 729 F.2d 1026, 1033 & n.4 (5th Cir. 1984) *cert. denied*, 469 U.S. 854 (1984); *Gundy v. United States*, 728 F.2d 484, 488 (l0th Cir. 1984) (per curiam); *McDonald v. Federal Laboratories, Inc.*, 724 F.2d 243, 248 (lst Cir. 1984) ("the 'plain error' doctrine has no application where the party claiming error invited or elicited the alleged error"); *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691, 696 (8th Cir. 1978) (defendant invited error by telling trial court that jury could find punitive damages without awarding actual damages); *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975) (counsel having proposed that evidence be developed in summation rather than in jury charge, invited error doctrine bars challenge to trial court's failure in jury instructions to relate relevant law to disputed facts); *James v. Beaufort County Board of Education*, 465 F.2d 477, 479 (4th Cir. 1972); *Director General of India Supply Mission v. Steamship Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

Finally, even if the decision of the Court of Appeals represents a departure from the rationale of *Coca Cola*, as Phenix argued to the Eighth Circuit in its petition for rehearing and suggestion for rehearing en banc, the decision below would represent no more than an intra-circuit conflict, which should be resolved by the Eighth Circuit rather than by this Court. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.6, at 204-05 (6th ed. 1986); *see generally Davis v. United States*, 417 U.S. 333, 340 (1974) (Solicitor General opposed certiorari petition on ground that intra-circuit conflict should be resolved by circuit; petition was denied).

II.

THE EIGHTH CIRCUIT APPLIED THE PLAIN ERROR EXCEPTION TO FEDERAL RULE OF CIVIL PROCEDURE 51 PROPERLY AND IN A MANNER CONSISTENT WITH THE OTHER CIRCUITS THAT RECOGNIZE THE EXCEPTION.

Taken literally, Rule 51 bars a party from assigning a jury instruction as error unless objection to that instruction was lodged before the jury retired to deliberate. Over the years, however, courts have recognized a "plain error" exception to that blanket rule in cases where literal application of Rule 51 would result in a miscarriage of justice. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558, at 672 (1971).

Phenix maintains that the Eighth Circuit has effectively "abrogat[ed]" the plain error exception, thereby aligning itself with the First, Seventh, and Ninth Circuits in opposition to the other circuits. Cert. Pet. at 24. This argument rests on a misunderstanding of the law and a misreading of what took place below.

Contrary to Phenix's suggestion, the Eighth Circuit is in the mainstream of Rule 51 jurisprudence. It follows the same approach as all other circuits that have considered adoption of the plain error exception, except for the Ninth Circuit, the only court of appeals to reject the exception.[11] In this case, the Eighth Circuit stated that the exception applies

> where the alleged error "is plain error in the sense that a miscarriage of justice would otherwise result." *Rowe International, Inc. v. J-B Enterprises, Inc.*, 647 F.2d 830,

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[11] *See, e.g., Brett v. Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union*, 828 F.2d 1409, 1414 n.7 (9th Cir. 1987); *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978). Even the Ninth Circuit has recognized an exception to Rule 51 when the district court is aware of a party's position and further objection would be futile. *See, e.g., Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *United States v. 57.09 Acres of Land, More or Less, Situate in Skamania County, State of Washington*, 757 F.2d 1025, 1027 (9th Cir. 1985); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems*, 732 F.2d 1403, 1410 (9th Cir. 1984).

> 835 (8th Cir. 1981). But we emphasize the extremely narrow scope of this rule in civil cases; it lies "in only those exceptional cases where the error has 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Morris v. Getscher*, 708 F.2d 1306, 1309 (8th Cir. 1983), quoting *Rowe International, supra*, at 835.

P.A. at 11; *see also Elmore v. United States*, 843 F.2d 1128, 1132 (8th Cir. 1988); *Thomas v. Booker*, 784 F.2d 299, 307 (8th Cir.), *cert. denied*, 476 U.S. 1117 (1986); *Swift v. R.H. Macy's & Co.*, 780 F.2d 1358, 1360-61 (8th Cir. 1985); *Gander v. Mr. Steak of Sun Ray, Inc.*, 774 F.2d 920, 923 (8th Cir. 1985); *Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1069 (8th Cir.), *cert. denied*, 469 U.S. 1077 (1984); *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1209-10 (8th Cir. 1982).

Phenix is also incorrect in its assertion that the First and Seventh Circuits reject the plain error exception. The First Circuit accepts the doctrine in exceptional cases where necessary to prevent a clear miscarriage of justice. *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 809 (lst Cir.), *cert. denied*, 109 S. Ct. 392 (1988); *Elwood v. Pina*, 815 F.2d 173, 175-76 (lst Cir. 1987); *Morris v. Travisono*, 528 F.2d 856, 859 (lst Cir. 1976); *Nimrod v. Sylvester*, 369 F.2d 870, 873 (lst Cir. 1966). The Seventh Circuit also recognizes an exception to the objection requirements of Rule 51 "in 'very rare circumstances where necessary to prevent a miscarriage of justice.'" *Rakovich v. Wade*, 850 F.2d 1180, 1203 (7th Cir.) (en banc) (quoting *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 370 (7th Cir. 1978)), *cert. denied*, 109 S. Ct. 497 (1988).[12]

Moreover, the approach taken in the First, Seventh, and Eighth Circuits does not differ in any significant way from that followed in the circuits that Phenix views as more lenient. *See,*

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[12] The Seventh Circuit has held, however, that the plain error doctrine will not protect parties from the consequences of their decisions where, as here, the failure to object may be part of their trial strategy. *See Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295-96 (7th Cir. 1987); *see also Rakovich, supra*, 850 F.2d at 1202-03 (refusing to apply plain error exception where party proposed jury instruction it cited on appeal as error).

e.g., *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 107-08 (2d Cir. 1988) (plain error doctrine appropriate to correct "obvious instances of injustice or misapplied law") (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981)); *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1414 (11th Cir. 1986) (doctrine applies "only in exceptional cases where the error is "'so fundamental as to result in a miscarriage of justice'"") (quoting *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir. 1979)), *cert. denied*, 479 U.S. 1090 (1987); *Kerr v. State Farm Fire & Casualty Co.*, 731 F.2d 227, 229 (4th Cir. 1984) (exception applies where error was fundamental and highly prejudicial) (citing *Ratay v. Lincoln National Life Insurance Co.*, 378 F.2d 209, 212 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967)); *Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23, 27 (3d Cir. 1981) (exception applies when error is fundamental and highly prejudicial or when instructions leave jury without adequate guidance and failure to consider error would result in miscarriage of justice); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371 (5th Cir. 1969) (exception applies when "error has been committed which results in a miscarriage of justice"); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 166 (6th Cir. 1967) (exception applies where error is obvious and prejudicial).

In short, the Eighth Circuit applied in this case essentially the same standard that prevails in all circuits but the Ninth. A deviation from the prevailing rule by a single circuit does not create a sufficiently serious conflict to justify certiorari, particularly in a case where the petitioner received the benefit of the standard favorable to its position and still lost. *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.4, at 201-02 (6th ed. 1986) (certiorari may be denied where resolution of conflict is irrelevant to ultimate outcome of case).[13]

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[13] Even if there were a serious conflict among the courts concerning the proper interpretation of Rule 51, such a disagreement would not provide a strong basis for a grant of certiorari. Importantly, conflicting interpretations of Rule 51 will not lead to forum-shopping, since no one will choose where to sue based on the likelihood that an appeals court will reconsider a jury charge to which no objection has been stated. Nor will a conflict on this issue pose difficulties for individuals or corporations who conduct their activities

There is also no substance to Phenix's suggestion that the Eighth Circuit, while paying lip service to the plain error exception, effectively ignored it in this case. Cert. Pet. at 24. The Court of Appeals correctly found that the instruction of which Phenix complains did not fall within the plain error exception because it was "at worst, arguable" and "resulted at least in part from Phenix's own tactical position at trial." P.A. at 11. As Shearson argued to the Eighth Circuit, the burden of proof was properly assigned to Phenix because it affirmatively sought more than $7.9 million in damages on the basis of its guarantees in the MTJ bond transaction. Having made that affirmative claim, Phenix assumed the burden of proving its damages, i.e., that it would suffer a loss as a result of its guarantee.

Finally, even assuming that the Eighth Circuit erred in its application of the plain error doctrine, this would not be an appropriate case for a grant of certiorari. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.17, at 221 (6th ed. 1986); *see Boag v. McDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (quoting Address of Chief Justice Vinson before the American Bar Association (Sept. 7, 1949)); *Watt v. Alaska*, 451 U.S. 259, 275-76 & n.5 (1981) (Stevens, J., concurring). If this Court were to review application by the courts of appeals of the plain error doctrine to the facts of particular cases as Phenix requests here, it would deviate from its appropriate role.

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in several states, because Rule 51 does not state a substantive obligation with which they must comply. *See generally* Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 725 (1984).

Indeed, there is some benefit to be derived from circuit-by-circuit experimentation in procedural rules. *See* Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 Am. U.L. Rev. 881, 898-99 & n.61 (1975).

CONCLUSION

For the reasons set forth above, respondent Shearson Lehman Hutton Inc. respectfully requests that this Court deny the instant petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated: February 10, 1989
New York, New York

Respectfully submitted,

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RESPONDENT'S APPENDIX 1

EXCERPTS FROM PHENIX FEDERAL'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Filed August 29, 1986

[Caption and Material Omitted]
[p. 25]

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PROCEEDS FROM THE MTJ BOND TRANSACTION AND OFFSETTING THOSE PROCEEDS AGAINST THE JURY'S DAMAGE AWARD.

[Material Omitted]
[p. 33]

Analysis of cases applying these principles in Iowa and elsewhere demonstrate three distinct, yet interrelated reasons the MTJ bond transaction was irrelevant in this case, each legally sufficient in and of itself to bar admission: (1) the bond transaction did not confer a "benefit" on Phenix Federal; (2) the prospects of the bond issue were at best too speculative to submit to the jury — a conclusion actually reached by the District Court on a related issue — and (3) any benefit that might have accrued to Phenix Federal had the plant been successful over the next twenty years would clearly have derived from a collateral source — an independent contract entered into by Phenix Federal for substantial consideration and at substantial risk.

[Material Omitted]
[p.43]

Finally, the $6.5 million would not have been a proper offset even if the prospects of the plant had been amenable to proof, the burden on that issue properly allocated (*see* Part II *infra*), and sufficient evidence presented to prove the plant would be successful.

[Material Omitted]
[p. 46]

II. ASSUMING *ARGUENDO* THE MTJ BOND PROCEEDS WERE ADMISSIBLE, THE TRIAL COURT IMPROPERLY PLACED ON PHENIX FEDERAL THE BURDEN OF PROVING HOW MUCH IT WOULD LOSE ON THE LETTER OF CREDIT

Even if the $6.5 million in proceeds and the prospects of the ethanol plant through 2004 had been admissible as both relevant and amenable to proof to a reasonable certainty, how much Phenix Federal was likely to retain would necessarily be a matter of mitigation, with the burden of proof on defendant Shearson. Instead, the burden was placed on Phenix Federal in the form of special interrogatory No. 6.

[Material Omitted]
[p. 55]

If this court concludes the MTJ proceeds were admissible as an offset, analysis must then focus on allocation of the burden of proof on the prospects of the bond issue. On that issue there was admittedly no trial objection. It is therefore not reviewable here unless misallocation of that burden constitutes "plain error."

[Material Omitted]

RESPONDENT'S APPENDIX 2

EXCERPTS FROM SHEARSON'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Filed April 15, 1987

[Caption and Material Omitted]

[pp. 7-11]

ARGUMENT

POINT I

PHENIX'S APPEAL MUST BE DENIED

A. Phenix Waived Its Right To Appeal The Offset, The Introduction Of Evidence And The Allocation Of The Burden Of Proof Relating To The MTJ Transaction, And Thus Its Damage Judgment Is Not Reviewable By This Court.

Phenix failed to preserve as issues for appeal any objections to the offset, burden of proof and evidentiary rulings which it now claims constitute reversible error. As shown below, Phenix's waiver with respect to these issues could not be more compelling.

1. Phenix's failure to object at trial bars its present appeal.

A party's failure to object or otherwise inform the court of its disagreement with the court's action waives the objection and precludes later appeal. *See, e.g., Dehues v. Western Electric Co.*, 710 F.2d 1344 (8th Cir. 1983); *United States ex rel. Planet Corp. v. McDonald Construction Co.*, 417 F.2d 687 (8th Cir. 1969). This waiver applies to all court actions, whether rulings on questions of law, jury instructions or admission of evidence. *See* Fed. R. Civ. P. 51 (party must object to

jury instruction before jury is charged in order to preserve appeal); Fed. R. Civ. P. 46 (failure to make known to court objection to ruling or grounds therefor or to inform court of desired contrary ruling waives later appeal); Fed. R. Evid. 103(a)(1) (appeal on basis of erroneous decision concerning admission or exclusion of evidence is barred by failure to object at time of ruling).

To preserve an issue for appeal, a party must raise the issue in the trial court before or at the time of the court's decision. *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976). Issues which were "not raised in the trial court cannot be considered by [an appellate court] as a basis for reversal." *Edwards v. Hurtel*, 724 F.2d 689, 690 (8th Cir. 1984); *Kelley v. Crunk*, 713 F.2d 426, 427 (8th Cir. 1983); *Rowe International, Inc. v. J-B Enterprises, Inc.*, 647 F.2d 830, 835 (8th Cir. 1981). *See also Shepard v. General Motors Corp.*, 423 F.2d 406 (1st Cir. 1970) (appellants cannot appeal from trial court's ruling that damages would be offset where they did not contest or object to the ruling during trial).

The reasons for requiring a party to object to, or make known its disagreement with, a court's action at the time of that action are twofold. First, it enables the court to "reconsider the ruling and make desired changes". *Edwards v. Hurtel*, 724 F.2d 689, 690 (8th Cir. 1984); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976). Second, it prevents a losing party from unfairly obtaining a new trial or other relief by relying on a possible error at trial which it should have sought to correct. *Johnson v. Houser*, 704 F.2d 1049 (8th Cir. 1983); *Lange v. Schultz*, 627 F.2d 122 (8th Cir. 1980). Otherwise a party could secure a second opportunity to try its case if it decided that it were dissatisfied with the first result.

Phenix offers no excuse for its failure to object below. Phenix was given ample notice by Shearson of its position and

by the District Court of its rulings and instructions. Shearson made known its position concerning the effect of the MTJ bond proceeds throughout the trial proceedings.[3] Similarly, Phenix was given more than ample time to consider and object to the jury instructions including the offset to be applied and the allocation of the burden of proof. Early in the damages trial the Court solicited proposed instructions from and thereafter distributed its own draft instructions to all parties. [*See* Tr. 4277, 5460-61, 5740-41, J.A. 1412, 1651-52, 1682-83.] This was followed by two conferences on June 7 and June 10 among the Court and counsel to discuss the instructions, including the offset and burden of proof instructions, and to afford the parties opportunities to suggest changes and lodge objections. [Tr. 5824-25, 5890-959, J.A. 1695-96.] On June 12, 1985, the Court read its instructions to the jury. At no point during this process did Phenix make known any concern about, much less objection to, the District Court's rulings or instructions.

2. Phenix's agreement with the District Court's actions bars its present appeal.

Preclusion of appellate review is particularly apt when a party not only failed to object by silence, but also encouraged and agreed with the trial court's action. *See Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978); *Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456, 459-60 (8th Cir. 1968). "[A] party cannot successfully complain of error for which he himself is responsible or of rulings which he has invited the trial court to make." *Mach v. Abbott Co.*, 136 F.2d 7, 10 (8th Cir.), *cert. denied*, 320 U.S. 773 (1943). *See also Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985) ("it is 'fundamental that where the defendant "opened the door" and "invited error" there can

[3] It did so in its pretrial brief on damages [Shearson's Brief on Damage Issues at 37-41, J.A. 89-92]; at the outset of the damages trial in its opening statement [Tr. 4223, J.A. 1403]; again during the trial, in a memorandum of law [Docket Number 658], and by its questioning of witnesses, without objection, to demonstrate that Phenix had been repaid $6.5 million [*See* Tr. 4341-44, 4969-70, J.A. 1440-43, 1539-40]; in its motion for a directed verdict [Tr. 5828-29, J.A. 1697-98]; and finally during summation. [Tr. 6112, 6114, J.A. 1750, 1752.]

be no reversible error.' ") (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)). Phenix's conduct fits squarely within this rule.

In his response to Shearson's motion for a directed verdict, Phenix's counsel told the Court "you've already subtracted, which we fully agree with, the six and a half million." [Tr. 5843, J.A. 1708.] During summation, counsel for Phenix twice told the jury that Phenix agreed with the $6.5 million offset. He told the jury "the damages which we are claiming, totals $20,600,324.57, and from that figure the Court will instruct you that you're not to consider the fact that he will subtract from this figure, and we fully agree with this calculation" [Tr. 6041, J.A. 1737] and later repeated that "the Court will instruct — which we agree with this instruction, will subtract $6.5 million from that which represents the money that we have received in the bond transaction." [Tr. 6042, J.A. 1738.] And during his rebuttal to Shearson's summation, Phenix's counsel summarized both his client's damages and, without disagreement, the manner in which the offset would be applied:

> When you look on the board, those are the figures which reflect our damages as they are today when you must consider them, and they total the 19 million, as I have stated; and when the Judge subtracts, as he will instruct you he will do, the 6.5, you will have the figure that we say we're damaged today.

[Tr. 6132, J.A. 1757.]

Moreover, as explained more fully below, during the damage trial Phenix did not claim the MTJ transaction was irrelevent. Phenix used the MTJ guarantee offensively as a basis to claim in excess of $7.9 million in damages. In that connection, Phenix was the first party to bring the matter to the jury's attention in the opening statement of its counsel and Phenix also introduced evidence concerning the transaction. [Tr. 4216, 4923-28, J.A. 1402, 1522-27.] Finally, Phenix affirmatively advised the Court that it had no objection to the

jury instructions allocating the burden of proof. [Tr. 5934, 5946, J.A. 1714, 1718; *see also* Tr. 5950, J.A. 1719.]

[Material Omitted]
[pp. 14-28]

4. The plain error rule is inapplicable.

Secondly, Phenix argues that the plain error rule is applicable. [Phenix Brief at 55-57.] As explained below, Shearson strenuously urges that no error was committed. But even if it were, the plain error rule is not available to Phenix. The rule is sparingly applied only "to the exceptional case in which error has affected seriously the fairness, integrity or public reputation of judicial proceedings." *Johnson v. Houser*, 704 F.2d 1049, 1052 (8th Cir. 1983); *Lange v. Schultz*, 627 F.2d 122, 128 (8th Cir. 1980); *Figge Auto Co. v. Taylor*, 325 F.2d 899, 907 (8th Cir. 1964). This is not such a case.

In cases where, as here, the appellant did not merely remain silent, but expressly told the court that it agreed with the challenged ruling or affirmatively stated that it had no objection, considerations of fairness and finality overwhelmingly demand that error should not give rise to appellate rights. *See Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985); *Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456 (8th Cir. 1968).[9] As explained more fully below, moreover, Phenix sought damages as a result of the MTJ transaction. Having lost on that claim, Phenix should not be permitted under the guise of the plain error rule now to reverse its strategy and claim error because it is dissatisfied with the result.

Insofar as Phenix contends that the burden of proof was misallocated, Eight Circuit cases demonstrate that the plain

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[9] In *Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23 (3d Cir. 1981), a case cited by Phenix, the court found plain error in jury instructions even though the appellant's counsel had said that he had no objections to the instructions. Phenix, however, did far more than simply state its lack of objection to the District Court's rulings. Moreover, the Eighth Circuit, unlike the Third Circuit, refuses to find plain error under such circumstances. *See Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456 (8th Cir. 1968).

error rule is not available here. In *Fulton v. Chicago, Rock Island & Pacific Railroad*, 481 F.2d 326 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973), for example, a railroad counterclaimed against a shipper for the collapse of the railroad's bridge caused when machinery loaded by the shipper struck the bridge during transport. After judgment was entered for the shipper, the railroad appealed on the ground that the trial court erred in instructing the jury that the railroad bore the burden of proving its freedom from contributory negligence. The Eighth Circuit refused to determine the merits of the railroad's appeal and held that the railroad had waived the burden of proof issue even though it had requested a specific instruction allocating the burden of proof to the shipper: "regardless of the substantive merits of this contention, [the railroad] failed to object after the charge was delivered to this particular instruction and it is therefore precluded from raising this issue on appeal." *Id.* at 338. Even the railroad's requested instruction did not "obviate the need for a specific statement of the alleged error." *Id. See also Farrar v. Cain*, 756 F.2d 1148, 1150 (5th Cir. 1985) (claim of alleged error in burden of proof instruction summarily rejected because no objection at trial).

In *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985), the appellant contended that the trial court erred in instructing the jury that the plaintiff needed to prove its case only by a preponderance of the evidence rather than by clear and convincing evidence. The Eighth Circuit, noting that the appellant not only had not objected to but also had included the preponderance standard in his requested instructions, held that the court "need not search for plain error, for it is 'fundamental that where the defendant "opened the door" and "invited error" there can be no reversible error.' " *Id.* at 727 (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)). *See also Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 415-16 (8th Cir. 1985); *Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456, 459-60 (8th Cir. 1968) (Rule 51 "cannot be circumvented under the guise of

'plain error' " where appellant specifically told court that he had no objection to instructions).[10]

Finally, the plain error exception is not applicable unless the Court is convinced that the result would have been different if the burden of proof had been allocated differently. *See Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. 1969). *See also Johnson v. Houser*, 704 F.2d 1049 (8th Cir. 1983). Phenix has not demonstrated, as it must, that if the burden had been allocated to Shearson, the result would have been different. As explained in detail below, the evidence adduced concerning the future prospects and the value of the plant demonstrated that the plant would be successful, that the plant had a substantial market value and,

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[10] Phenix states that "federal courts of appeals applying the plain error standard have almost universally held that misallocation or mistatement [sic] of the burden of proof on an important issue constitutes plain error." [Phenix Brief at 56.] As demonstrated by *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985), and *Fulton v. Chicago, Rock Island and Pacific Railroad*, 481 F.2d 326 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973), this Circuit has never adopted such a rigid rule.

Moreover, in the three Eighth Circuit cases cited by Phenix where this Court found plain error, *Smith v. Updegraff*, 744 F.2d 1354 (8th Cir. 1984), *Morris v. Getscher*, 708 F.2d 1306 (8th Cir. 1983), and *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982), none of which involved alleged errors in the trial court's allocation of the burden of proof, there was no indication that the appellant had specifically told the trial judge, as Phenix did here, that it had no objections to the manner in which the case was submitted to the jury.

Finally, in *Teen-Ed, Inc. v. Kimball International Inc.*, 620 F.2d 399, 401-02 (3d Cir. 1980), the other main case on which Phenix relies, before vacating the lower court judgment on the basis of an argument raised for the first time on appeal, the appellate court noted that neither the appellant nor the appellee had assisted the trial court in resolving the "very difficult evidentiary problem" at issue. Moreover, the court stated, that "[u]nder ordinary circumstances, perhaps, even this concert of activity would not be sufficient to vacate a judgment," but held that because the court's erroneous ruling had prevented appellant from *presenting* its damages case, a new trial was required. Here, on the other hand, the issues of Phenix's damage claims and the MTJ transaction were fully presented and no evidence concerning damages legally recoverable by Phenix was excluded from the jury.

accordingly, it was unlikely that Phenix would suffer any loss under its MTJ guarantee. *See* discussion at Point I(B)(3)(b) and Point II(B), *infra.*

For all these reasons, the plain error rule, like the other contentions Phenix makes to excuse its failure to object, is not available to Phenix.

B. The Offset Of $6.5 Million Against Phenix's Damages And The Court's Allocation Of The Burden Of Proof Concerning Such Damages Were Legally Correct.

Relying upon several different strands of authority, Phenix claims that as a matter of law it was error for the District Court to offset against the damage award the $6.5 million which Phenix received in the MTJ transaction. Additionally, Phenix contends that if the offset were not improper as a matter of law, the District Court erred in allocating to Phenix, rather than Shearson, the burden of proving that it would suffer damage under the MTJ guarantees. As demonstrated below, the rulings of the District Court concerning the offset and the burden of proof were correct and reversal would not be appropriate even if Phenix had preserved its objections.

1. Phenix has fundamentally revised the approach it took to the MTJ proceeds at trial.

In the opening page of its brief, Phenix criticizes the District Court for rejecting "appellant's contention that these bonds proceeds were irrelevant" and for placing on appellant "the burden to prove it would lose any of this money" under the MTJ guarantee. It then concludes that "in so doing, the District Court turned the law of mitigation of damages on its head and denied appellant any remedy for Shearson's wrong." These criticisms are based on the fundamental premise which Phenix asserts much later in its brief that "plaintiffs agreed not to claim any damages that occurred after December 26, 1984, the day before the closing on the MTJ bond issue." [Phenix Brief at 54.]

Based on that fundamental premise, in the remainder of its brief Phenix attempts to demonstrate that its receipt of the $6.5

million was irrelevant as a matter of law and could not be considered in reduction of its damages or, alternatively, if the MTJ transaction was relevant, it was relevant only to mitigation of damages and hence the burden of proving Phenix would not lose the $6.5 million should have been placed on Shearson. These contentions substantially and fundamentally mischaracterize the positions Phenix took with respect to the MTJ transaction during the damages trial.

During the damages trial Phenix in fact did not dispute that it had received and enjoyed the use and benefit of the $6.5 million and that such funds should properly reduce any overall recovery which Phenix obtained from the jury. Phenix conceded that the $6.5 million was an asset and that it could use such funds for any corporate purpose. [Tr. 4970, 5055, J.A. 1540, 1581.] It did not argue that it would lose part or all of the $6.5 million which it had received. Thus, contrary to what Phenix now suggests, the jury was not asked to determine whether Phenix would lose part or all of the $6.5 million, and the burden of proof was allocated to neither party on that issue.

Instead, Phenix contended that the MTJ guarantee gave rise to a separate additional damage claim of more than $7.9 million. During his opening and closing statements, Phenix's counsel explicitly told the jury that Phenix was seeking damages based upon the MTJ transaction. [Tr. 4215-16, 6039-40, J.A. 1401-02, 1735-36.] Consequently, the Court expressly charged the jury that Phenix was seeking several different kinds of consequential damages, including "the amount of principal and interest on the MTJ bonds that Phenix Federal will pay for which it will not be reimbursed." [Damage Instruction No. 39, J.A. 254-55.] Those damages were substantially more than and were not directly related to the $6.5 million which it concededly had received. Because Phenix was not contending that it would lose the benefit of the $6.5 million, but instead was pressing a separate claim for more than $7.9 million in damages based on its guarantee, Phenix agreed to the offset and accepted the burden of proof on the issue.

The reason Phenix seeks to portray the positions it took at trial in the way it now does is no mystery — it did not prevail on its claim for approximately $7.9 million in consequential damages for the MTJ transaction. Its indirect attempt to do so now should be rebuffed. In pressing the claim for damages under the guarantee, it was clearly Phenix's hope and expectation that it would recover in excess of $7.9 million and thus fare much better than if it merely claimed that the MTJ transaction was irrelevant.[11] Had Phenix prevailed on its MTJ guarantee claim, it would readily have accepted the benefits and presumably would not be complaining about the offset today. Having lost on the claim, however, it must be charged with the consequences of the positions it took. No blame can be placed on the District Court for the "extraordinary denouement" which Phenix complains has been reached. [Phenix Brief at 25.]

2. Neither the principles enunciated in the *National Steel* case nor the collateral source rule affect the propriety of the offset.

Phenix now claims that its receipt of $6.5 million was irrelevant to any issue and that even if it had not given a guarantee as part of the MTJ transaction it could retain that $6.5 million and still recover the full amount of the VBCA loans from Shearson. Phenix reaches this result by contending that its damages became fixed no later than December 1981 when

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[11] Phenix could not reasonably have claimed that it was entitled to damages under the MTJ guarantee and that Shearson was not entitled to offset the $6.5 million which Phenix had received. If it had done so, Phenix would have been seeking a possible recovery of not merely double but more than triple the amount of its loans to VBCA. As Phenix structured its damage claims, it sought approximately $7.2 million for the original and subsequent advances, including interest, and, in addition, approximately $7.9 million under the guarantee. If the offset had not been applied, Phenix would have been in the position of seeking in excess of $15.1 million (not including its other consequential damages) while at the same time retaining the $6.5 million it had received. As a result, if Phenix ultimately did not incur losses under its guarantee, it could well have recovered $15.1 million from Shearson although it had already received almost full repayment of its loans to VBCA. And even if Phenix were called upon to make payment under the guarantee, it would still be able to look to its mortgage on the plant.

"VBCA was unable to pay-off the $1.6 million interim loan" and that its damages could not have "un-accrued" as a result of the MTJ transaction. [Phenix Brief at 27-28.] In support of these contentions, Phenix relies principally upon *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339 (6th Cir. 1978) ("*National Steel*"). Phenix further contends that the payments received by Phenix were from a collateral source and hence do not reduce its damages. [Phenix Brief at 43-46.] These contentions must be rejected for several reasons aside from the fact that they ignore the positions Phenix took at trial, including the way it structured its damage claims.

The *National Steel* case is inapposite. That case held that damages for a three day loss of use of a steel mill which had "already accrued" at the time plaintiff began its efforts to mitigate could not be reduced by above normal production after the three day period. *National Steel* thus holds that certain types of damages, once having accrued, cannot be reduced by subsequent events. *National Steel* did not hold that payments made to a plaintiff after a cause of action has accrued may never reduce plaintiff's damages or that a payee of promissory notes such as Phenix can sue other parties such as Shearson for damages equal to the face amount of the notes without regard to payments received prior to trial. Such subsequent payments up to the time of trial are relevant to reduce damages.

Indeed, there are many instances in which payments made to a plaintiff after a cause of action accrues and before the time of trial eliminate or reduce damages. For example, although a guarantor may be sued upon default of the primary obligor, repayment of the indebtedness by the primary obligor or on its behalf prior to trial relieves the obligation of the guarantor. *See Bledsoe v. Cargill, Inc.*, 452 So. 2d 1334 (Ala. Civ. App. 1984); *Industrial Development Corp. v. Rocca*, 100 Idaho 228, 596 P.2d 100 (1978), *later appeal*, 102 Idaho 920, 643 P.2d 1090 (1982). Shearson's liability to Phenix may be viewed as analogous to that of a guarantor of the obligation of VBCA. It arose only because the promissory notes were not paid in a timely manner. Additionally, where more than one defendant

may be liable to a plaintiff for the same injury, whether in tort, contract or otherwise, payment by one defendant either in a settlement prior to trial or in satisfaction of judgment, reduces the liability of the other defendants to the plaintiff. *See, e.g., Wadle v. Jones*, 312 N.W.2d 510, 514 (Iowa 1981); *Brigdon v. Covington*, 298 N.W.2d 279, 280 (Iowa 1980); *Greiner v. Hicks*, 231 Iowa 141, 300 N.W. 727, 731 (1941); *Mulinix v. Saydel Consolidated School District*, 376 N.W.2d 109, 111 (Iowa Ct. App. 1985); *see also Syverson v. Heitmann*, 171 Cal. App. 3d 106, 110, 214 Cal. Rptr. 581, 584 (3d Dist. 1985) ("Where a plaintiff's settlement completely offsets the damages assessed against a nonsettling joint tortfeasor, it reduces the judgment to zero by operation of law."). Phenix may not avoid this rule simply because it did not sue VBCA, the primary obligor under the promissory notes.

Indeed, there are other examples as well. Thus, in an action for conversion, where payment has been made to the injured party for the property converted by the person in possession, the amount of that payment must be offset against any damages awarded the plaintiff against a defendant found liable for the conversion. *See Keota Produce Co. v. Chicago, Rock Island & Pacific Railroad*, 189 Iowa 1284, 179 N.W. 834, 835 (1920). *See also Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765, 769 (1979)(in an action for conversion against bank which paid out funds on forged instrument, bank was entitled to a setoff for amounts repaid by forger); *DoAll Dallas Co. v. Trinity National Bank*, 498 S.W.2d 396, 404 (Texas Ct. App. 1973 — writ ref. n.r.e.) (same).

Contrary to Phenix's contention, its actual damages did not accrue in respect of the $1.6 million loan in December 1981. Instead, the amount of its damages, if any, could not be determined until the time of trial. Accordingly, it would not have been sufficient for Phenix to have shown that it had not been paid in December 1981. Phenix was required to prove that as of the time of trial its loans to VBCA had not been paid. In recognition of this fact, Phenix's principal witness, Carroll Sasser, was not merely asked whether Phenix had been repaid in December 1981, but whether VBCA's indebtedness re-

mained outstanding at the time of trial. [Tr. 4927, 5052-53, J.A. 1526, 1578-79.]

If it were assumed that VBCA had secured permanent financing from a source other than Shearson in early 1982 or at some other time before trial and had used that financing to repay Phenix, the fallacy in plaintiff's argument becomes apparent. In that event, Phenix could not have recovered from Shearson or from VBCA. Phenix could not reasonably contend in that event, as it seeks to do now, that its damage claims against Shearson became fixed in December 1981, that repayment was from a collateral source and, therefore, it could still maintain an action against Shearson to obtain full recovery. Yet, that is exactly what happened through the MTJ transaction. Permanent financing was obtained which was used to repay Phenix.

In addition, Phenix's contention that its damages accrued in December 1981, became fixed at that time and were not subject to reduction is inconsistent with its claim for post-December 1981 advances. At trial, Phenix contended that after December 1981, it advanced more than $3.7 million in a "reasonable effort from the standpoint of a prudent lender, to recoup Phenix's original loan of $1.6 million." [Damage Instruction No. 43, J.A. 261A.] Stated otherwise, Phenix claimed that it made the subsequent advances to mitigate its original $1.6 million loss. Thus, Phenix conceded that if it had recovered the original $1.6 million as a result of the subsequent advances — by making the plant successful and enabling VBCA to repay the $1.6 million — it would have mitigated its damages in respect of the $1.6 million and could not have recovered those loans from Shearson. This makes clear that Phenix's damages were not fixed, absolute and immune from reduction as Phenix now claims.

For the same reasons, the collateral source rule is also inapplicable to the $6.5 million payment.[12] In addition, neither

[12] This is not, as Phenix claims, "a classic collateral source payment" situation. [Phenix Brief at 43.] The facts here are a far cry from the cases in which the collateral source rule developed. The collateral source rule is an

VBCA nor MTJ are collateral sources. Phenix received the $6.5 million from the parties which owed the debt.[13] Discharge of loans by, or on behalf of, the borrower cannot be considered a collateral payment. *See Huber, Hart & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278, 304, 136 Cal. Rptr. 603, 619 (5th Dist. 1977).

In sum, neither the principles set forth in the *National Steel* case nor the collateral source rule are applicable.

[Material Omitted]

[pp. 30-37]

b. Phenix's contingent obligation under its MTJ guarantee was not too speculative to be evaluated by the jury.

The factors the jury was instructed to consider in evaluating Phenix's potential loss under the guarantees, including the value and success of the plant, were not too speculative. [Damage Instruction No. 41, J.A. 258-59.] First, there was ample evidence to support a jury finding that the plant had substantial value to which Phenix could look if it had been

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exception to the general principle that an injured party is entitled to recover only for damages actually sustained. The rule typically applies to insurance payments received by personal injury claimants which were contracted for in advance or to employment benefits, such as sick leave payments, provided voluntarily. *See, e.g., Stewart v. Madison*, 278 N.W.2d 284, 293-94 (Iowa 1979) (rule applied to automobile insurance payments); *Rigby v. Eastman*, 217 N.W.2d 604, 609 (Iowa 1974) (rule applied to workmen's compensation payments); *Clark v. Berry Seed Co.*, 225 Iowa 262, 271, 280 N.W. 505, 510 (1938) (rule applied to payment of medical expenses by employer). It is intended primarily to preserve the rights of subrogation and the benefits of insurance for those who have purchased coverage. D. Dobbs, *Handbook on the Law of Remedies* § 3.5, at 185-86 (1973).

[13] Phenix contends that the $6.5 million did not discharge VBCA's indebtedness and therefore VBCA still owes approximately $5.3 million plus interest for the loans made before December 27, 1984. [Phenix Brief at 33-34.] Phenix, however, is not entitled to keep and use the $6.5 million as an asset without crediting it against the debts of the parties from which it was received. Indeed, in apparent recognition of this fact, Phenix agreed that it would not seek to recover for the VBCA loans unless MTJ defaulted on its bond obligations. [Ex. 1654 at Art. 1.6 J.A. 647; Tr. 4343-44, J.A. 1442-43.]

called upon to make payments under the guarantees. Thus, the jury determined that the market value of the plant was $6.5 million as of December 1981. [Phenix Damage Interrogatory No. 8, J.A. 291.] As set forth below, there was overwhelming evidence to support this determination. *See* discussion at Point II(B), *infra.* Plaintiffs contended that by 1985, material improvements had been made in the plant [*See* Tr. 4290, 4297-301, 4345, J.A. 1420, 1422-26, 1444] which must have increased its value.

In addition, the future success or profitability of the plant was not, as a matter of law, incapable of proof as Phenix now contends. In 1984, the Iowa Supreme Court overturned the new business rule which previously barred recovery of damages based on future profits of a new business. *See Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984). Upon a proper showing, courts in Iowa and in various other jurisdictions permit recovery of lost future profits even though the proof of such profits involves uncertainty. *See, e.g., Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970); *Galindo v. Hibbard*, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984); *Cook Associates v. Warnick*, 664 P.2d 1161 (Utah 1983); *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260 (Minn. 1980).[15]

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[15] Phenix relies on *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980), *Groesbeck v. Napier*, 275 N.W.2d 388 (Iowa 1979), and *Stanley v. State*, 197 N.W.2d 599 (Iowa 1972), for the proposition that the plant's prospects were too speculative as a matter of law to be capable of proof. None of those cases involved future lost profits which, under *Harsha*, is now a matter capable of proof. In addition, here, Phenix had already received the MTJ proceeds. None of the above cases involved a comparable situation in which payment had already been made to the plaintiff, but only situations in which funds might possibly be received in the future.

Phenix also cites to *Great Lakes Gas Transmission Co. v. Grayco Constructors, Inc.*, 506 F.2d 498 (6th Cir. 1974), *cert. denied*, 420 U.S. 947 (1975), and *Randall v. Loftsgaarden*, 106 S. Ct. 3143 (1986). In *Great Lakes Gas*, the court held that the District Court properly excluded as speculative evidence concerning a gas company's pass-along to the public of repair costs resulting from the appellant's negligence through increased rates because the gas company's rates were highly regulated and could be readjusted. In *Randall*, the court held that tax benefits realized by defrauded investors would not be

Virtually the only proof adduced on the issue tended to show that the plant would become profitable after it reopened in 1985. For example, Leonard Conrad testified that he believed that by January 1985, many of the plant's problems had been solved and that the plant would thereafter be successful. Specifically, he testified that the equipment was substantially improved, the interest rate on the plant's indebtedness had been lowered and his ability to manage the plant had improved because of the experience he had gathered during the past three years. [Tr. 4297-301, 4303, 4341, 4345-48, J.A. 1422-26, 1427, 1440, 1444-47.] Additionally, Shearson introduced, without objection by Phenix, detailed MTJ projections prepared by Russel Ninas, the accountant employed by both Phenix and Conrad. They projected that during 1986 the plant would be able to fully cover payment of interest and principal on the MTJ bonds, including that portion which was past due.[16] [Tr. 4357-58, 5255-57, J.A. 1451-52, 1641-43; Ex. 1699, J.A. 783-94.] Such projections can be sufficient to support a jury verdict of lost profits. *See, e.g., International Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 431 (4th Cir. 1986); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1538-39 (11th Cir. 1985); *Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984). This is particularly true where, as here, the projections are offered against the party that prepared them or relied on them in making business decisions. *See Perma Research & Development Co. v. Singer Co.*, 402 F. Supp. 881, 900 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976).

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used to offset their damages because of the "substantial" burden of reconstructing the investors' tax histories. Here, by contrast, the possibility that Phenix would sustain losses under its guarantee depended on the future profitability of the plant, which the Iowa Supreme Court in *Harsha* held was not too speculative for proof, and on the value of the plant, about which there was extensive evidence.

[16] While Phenix now emphasizes the disclaimer included in the projections [Phenix Brief at 41 n.32], this argument misses the point. Shearson does not contend that the projections were a guaranty of future success. Presumably, however, they were conscientiously prepared by plaintiffs and constitute one basis on which Phenix made important decisions concerning the plant including its decision to make the interest payments on which MTJ defaulted. The weight to be accorded to the projections was a matter for the jury to determine.

The principal evidence on which Phenix relied to show possible losses under the guarantee was the fact that MTJ had been unable to make the initial interest payment on the bonds in January 1985.[17] [Tr. 4929, 5041, 5047, J.A. 1528, 1572, 1577.] This evidence had almost no probative value. All of the witnesses who addressed the issue testified that an alcohol plant could not be expected to be profitable in its early months of operations. [Tr. 4603-04, 4854, 5194, 5489, J.A. 1467-68, 1474, 1613, 1653.] Consistent with this testimony, the MTJ projections predicted that the plant would incur losses in its early months and would turn profitable thereafter. [Ex. 1699, J.A. 783-94.] Phenix made no attempt to impeach the projections and offered not a scintilla of evidence that MTJ would not be profitable following its shake-down phase.

Phenix relies heavily on the fact that the District Court disallowed the jury awards of lost profits to VBCA for 1982 and 1983 as demonstrating that the plant's prospects for the post-1985 period must have been incapable of proof. [Phenix Brief at 42-43.] Phenix misconstrues the rationale for the District Court's decision. The District Court did not hold that the 1982 and 1983 lost profits were incapable of proof as a matter of law. Rather it held that VBCA had failed to introduce such proof and that other proof which was offered demonstrated as a matter of law that the plant could not have been profitable during those years. The evidence concerning the plant's post-1985 prospects had none of those failings which the Court found decisive in vacating the award for 1982 and 1983 lost profits.[18] [*See* Decision at 7-8, J.A. 468-69.]

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[17] Phenix also briefly questioned Carroll Keim, Shearson's expert, to clarify his testimony that in his judgment an ethanol plant with a 2.5 million gallon capacity, such as the Bonaparte plant, as a general matter is not economically feasible. [Tr. 5506-08, J.A. 1655-57.] Even before the plant reopened after the MTJ bond issue, however, its capacity had been increased to 3.5 million gallons. [Tr. 4352, J.A. 1449.] Moreover, Keim qualified his testimony by stating that the profitability of a plant depends in each case on several variables and by citing to another plant with a 2.5 million gallon capacity which had been "extremely successful." [Tr. 5506-07, J.A. 1655-56.]

[18] Phenix refers to design and conception flaws in the plant and the fact that Ninas' projections concerning MTJ's future operations could not be

Finally, Phenix refers to statements of Shearson's counsel during summation as showing it was impossible for the jury to determine the future success of the plant. [Phenix Brief at 40.] The thrust of those arguments was, as explained above, that Phenix had offered no persuasive evidence to carry its burden of proving that the plant would not be successful and that the only available evidence tended to show the opposite. Those arguments remain valid.

In sum, the likelihood that Phenix would sustain loss under its guarantee was a factual matter capable of proof, which the jury determined against Phenix. There was ample evidence to support the jury's finding.

4. The District Court correctly allocated the burden of proof to Phenix.

Phenix now contends that if the receipt of the MTJ funds was relevant, it was a matter of mitigation and that the burden of proof should have been placed on Shearson to demonstrate that it would not lose those funds. [Phenix Brief at 46-56.] It further claims that because the future prospects of the plant and its ability to repay the principal and interest on the bonds was too speculative to be susceptible of proof, Shearson could not have met that burden, that a new trial is not required and that judgment should be entered in its favor for the full amount of the jury award. [Phenix Brief at 58-59.]

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verified by actual operating data in arguing that "the prospects of the plant through the year 2004 were not (and could not be) shown with reasonable certainty." [Phenix Brief at 43.] It is surprising, to say the least, that Phenix would have participated in the MTJ transaction and assumed financial exposure in that regard if it believed the plant had design flaws. In any event, by 1985, any faulty equipment had been replaced and the plant upgraded. [Tr. 4298, 4300-01, 4344-47, J.A. 1423, 1425-26, 1443-46.] In addition, the assumptions on which Ninas based his MTJ projections differed from the assumptions in the original 1981 VBCA projections and reflected the plant's actual operations as well as Conrad's three years of experience with ethanol production. [Tr. 4359-60, J.A. 1453-54; Ex. 1699 at 2-3, J.A. 784-85.] Iowa law does not require anything more. *See Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984).

In the first place, Phenix concedes that "on [the burden of proof] issue there was admittedly no trial objection." [Phenix Brief at 55.] As demonstrated above, Phenix may not invoke the plain error rule to avoid this failure and consequently is barred from raising the issue for the first time now. *See* discussion at Point I(A)(4), *supra.*

Moreover, it is clear that because of the way Phenix structured its damage claims, the burden of proof properly rested with Phenix. As explained above, Phenix did not frame the issue for jury determination in the way it now does. It did not request that the jury be instructed to determine what portion of the $6.5 million Phenix would retain. The jury was not instructed to and did not resolve that issue and the burden of proof on that issue was not allocated to either party. Instead, Phenix affirmatively sought more than $7.9 million in damages on the basis of the MTJ guarantees. That was the issue the jury was instructed to and did determine. As with all of its damage claims, Phenix bore the burden of establishing damage and the amount thereof. [Damage Instruction Nos. 40 and 50 J.A. 256-57, 265-66.] *See Sedco International, S.A. v. Cory*, 522 F. Supp. 254, 322 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

The allocation of the burden of proof was correct for another reason. Even if Phenix were allowed on this appeal to rewrite what happened at trial and to characterize the MTJ transaction as relevant only to affirmative defense issues, Shearson did meet its burden. Shearson's burden was to demonstrate that Phenix received the $6.5 million. This fact was demonstrated without dispute and as a matter of law. [*See, e.g.*, Tr. 4341, 4969-70, J.A. 1440, 1539-40.] If Phenix had contended that it would not retain the $6.5 million and therefore did not benefit from its receipt of the funds, the burden rested with Phenix to prove that contention.

Phenix has not cited a single case in which a defendant has been required to prove not only receipt of funds by plaintiff which mitigate damages, but that plaintiff will thereafter not

lose the benefit of such funds.[19] The cases relied on by Phenix in which the burden of proof has been placed on the defendant to prove a mitigating offset to the plaintiff's damages support this reasoning. [*See* Phenix Brief at 48-49.] In those cases in which an offset was allowed, the burden of proof was met by establishing that the credit or other offset payment was actually paid to and received by the plaintiff. *See, e.g., Cates v. United States*, 451 F.2d 411, 417-18 (5th Cir. 1971). *See also Wadle v. Jones*, 312 N.W.2d 510, 515 (Iowa 1981). Shearson met its burden in this regard when it demonstrated that Phenix received a payment of $6.5 million in the MTJ bond offering.[20]

[Material Omitted]

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[19] *National Steel* did not reach this question. At most, the court held that a defendant has the burden of proving the receipt of funds that mitigate the plaintiff's damages, not that the funds received were not thereafter lost. *See* 574 F.2d at 344-45.

[20] Phenix contends that if this Court were to accept its various contentions, a new trial would not be necessary. Instead it asks the Court simply to enter judgment on the jury verdict. [Phenix Brief at 58-59.] Because of the importance of the MTJ transaction to the trial insofar as it concerned Phenix's damages and Phenix's role in eliciting or, at a minimum, acquiescing in the actions which it now challenges, Phenix's request should be rejected. Moreover, a new trial would also be required because it is impossible to know that the jury instruction that Phenix's damages would be reduced by $6.5 million had no effect on the jury's deliberations.

RESPONDENT'S APPENDIX 3

EXCERPTS FROM DISTRICT COURT'S JURY INSTRUCTIONS

INSTRUCTION NO. 39

Phenix Federal's claim for general damages consists of the 1.6 million dollar construction loan it made before learning that Shearson was not going to provide permanent financing for the Van Buren County Alcohol plant. It is for you to determine the amount of general damages Phenix Federal has sustained as a result of Shearson's failure to provide permanent financing.

In addition, Phenix Federal claims several different kinds of consequential damages, as follows:

1. Loss of interest on the 1.6 million dollar loan that accrued after Phenix Federal knew that Shearson was not going to provide long-term financing for the Van Buren County Alcohol plant.

2. Advancements and interest on the advancements to Van Buren County Alcohol for equipment and operating expenses after Phenix Federal knew that Shearson would not provide permanent financing.

3. Expenses incurred by Phenix Federal in overseeing the operations of the Van Buren County Alcohol plant.

4. Loss due to the decrease in the value of Phenix Federal stock because of Shearson's failure to provide long-term financing.

5. Losses that are contingent on success of the plant, the value of the plant, and the guarantees of Leonard Conrad and Van Buren County Alcohol, consisting of the amount of principal and interest on the MTJ bonds that Phenix Federal will pay for which it will not be reimbursed under the guarantees or the plant mortgages, reduced to present value.

It is for you to determine which, if any, of these claims for consequential damages were the result of Phenix's reliance on Shearson's negligent misrepresentations as explained in instructions *38-48*, or promissory estoppel, as explained in instructions *49-53*. There will be a separate interrogatory for each claim of consequential damages. You should place the amount of damages you determine in the appropriate space.

INSTRUCTION NO. 40

In order to recover any amount of damages for negligent misrepresentation, Phenix Federal must establish by a preponderance of the evidence each of the following propositions as to each item of damages:

1. That Phenix Federal acted in justifiable reliance in taking the action that resulted in the damages as explained in Instruction No. *42*;

2. That the particular plaintiff's reliance on the negligent misrepresentations was the proximate cause of the damages, as explained in Instruction No. *4*;

3. That Phenix Federal's reliance on the negligent misrepresentations was the legal cause of the damages, as explained in Instruction No. *43*;

4. That the amount of damages is reasonably certain, as explained in Instruction No. *44*; and

5. That the damages were sustained by the specific plaintiff claiming the right to recover, as explained in Instruction No. *45-46*.

Each of these propositions must be proved for each item of damages. Where more detailed instructions are necessary with reference to a particular item of damages, they will be included in the appropriate place.

If you find that Phenix Federal has established each of these propositions by a preponderance of the evidence as to one or more of the items of damages they claim, you must then determine the amount to be awarded for each item, but in no event can the amount be in excess of the amount claimed. If you find that Phenix Federal has failed to prove any of these propositions, by a preponderance of the evidence as to one or more of the items of damages claimed, then your verdict must be for Shearson as to that particular damage claim.

INSTRUCTION NO. 44

In order to recover damages on the negligent misrepresentation claim, Phenix Federal must prove the fact and amount of damages in accordance with Instruction No. *23.*

INSTRUCTION NO. 45

In order to recover any damages for negligent misrepresentation, Phenix Federal must show that it actually suffered the damage claimed. No plaintiff is permitted to recover for another plaintiff's losses. The plaintiffs have the burden of proving which of them sustained each injury. If Phenix Federal fails to prove that it sustained a particular loss claimed, then it may not recover for that loss.

RESPONDENT'S APPENDIX 4

Excerpts From Shearson's Brief In Resistance To Phenix's Motion To Amend Judgment Or For A New Trial

Filed October 9, 1985

[Caption and Table of Contents Omitted]

[p. 2]

Shearson has filed a Resistance to Phenix Federal's Motion to Amend Judgment or, in the alternative, for a New Trial. This Brief sets forth Shearson's position on the following issues: (1) Phenix Federal did not object to the damages instructions and thus has no standing to complain about those instructions, (2) the Court correctly submitted the issue of Phenix Federal's general damages, (3) the Court properly ruled on Plaintiffs' pretrial motions, and (4) the Court ruled correctly on the evidentiary issues complained of by Phenix Federal and, in any event, even if the rulings were incorrect, they do not provide a basis for an amended judgment or a new trial under the facts of this case.

[Material Omitted]

[pp. 3-4]

II. THE COURT CORRECTLY SUBMITTED THE ISSUE OF PHENIX FEDERAL'S GENERAL DAMAGES.

Paragraphs 1, 2, and 3 of Phenix Federal's Motion and pages 2-5 of its brief assert that the Court should have submitted Phenix's general damage claim in some different way. As noted above, this argument is groundless because of Phenix's failure to object to the jury instructions. Second, this argument is groundless because the Court properly submitted all appropriate individual damage claims made by Phenix Federal. The Court submitted these individual items of damages because these were the losses claimed by Phenix. Phenix appears to argue that it is entitled to some amorphous general damage claim that is not tied to any specific damage. The law does not allow Phenix to present to the jury this type of unspecified damages claim. *See* Restatement (Second) of Torts § 552B. *Cf. Lenard v. Argento*, 699 F.2d 874, 888-92 (7th Cir. 1983) (Plaintiff cannot recover "substantial damages" that are not tied to any specific actual damages). Clearly, Phenix cannot recover on any such amorphous claim, and the Court correctly submitted Phenix Federal's general damage claim.

[Material Omitted]

RESPONDENT'S APPENDIX 5

EXCERPTS FROM SHEARSON'S RESPONSE TO PHENIX'S POST-TRIAL MOTIONS

Filed December 27, 1985

[Caption and Table of Contents Omitted]
[pp. 1-5]

On October 10, 1985, Phenix Federal filed an "Amendment to Brief in Support of Motion to Amend Judgment or, In the Alternative, Motion for a New Trial." Because this Amendment was filed one day after Shearson's Resistance to Phenix Federal's Motion, Shearson files this Response to Phenix Federal's Brief.

Phenix Federal asserts two principal bases for its post trial motions — the Court's failure to submit an interrogatory allowing the jury to award an amorphous amount of "general damages" and the Court's jury instruction providing that the $6.5 million received from the MTJ bond issue must be set off from Phenix Federal's damages. However, as Shearson pointed out in its Resistance, Phenix Federal cannot now raise these complaints because they were not made at the appropriate time — at trial. See Shearson's Resistance at pages 2-3. Phenix Federal's failure to make any objections it had at the time clearly required by Rule 51 of the Federal Rules of Civil Procedure and the cases decided thereunder precludes it from now raising this issue and claiming error. Even if Phenix Federal could somehow ignore the dictates of Rule 51 and assert its claims at this time, Phenix Federal would still be unable to obtain the post judgment relief it seeks.

A. General Damages

Phenix Federal complains that it was not allowed to recover all of its "general damages" because the Court sub-

mitted as individual items of damage all of Phenix Federal's claimed specific losses. Phenix Federal's assertion that it was entitled to more than the sum of its individual damage claims indicates a misunderstanding of the Iowa law on "general damages". The cases cited in Phenix Federal's brief in support of its general damages proposition are cases decided pursuant to Georgia statutory definitions, and they have no relevance to this case. *See Hood v. Dunn & Bradstreet, Inc.*, 486 F.2d 25 (1973); *Hayes v. Irwin*, 541 F. Supp. 397 (S.D. Ga. 1982). Iowa damages cases specifically provide that "no rule of law should permit an injured party . . . to receive more than has been lost as the result of some tortious act." *Adams v. Deur*, 173 N.W.2d 100, 105 (Iowa 1969).

Additionally, Phenix Federal's argument misconstrues the meaning of the term "general damages". General damages are not some additional, amorphous category of damages in a fact situation such as the case at bar. Instead, general damages are those suffered by all injured parties in the same circumstances — a category of damages distinguished from special or consequential damages, which are those additional damages suffered by a particular injured party as a result of the breach. *See* R. Hillman, *Contract Remedies, Equity, and Restitution in Iowa* § 6.1, at 126 (1979). In this case Phenix Federal was allowed to assert claims for any and all damages that would be suffered by all injured parties in the same circumstances. Phenix Federal made claims for loss of principal and interest — loss of the "value" of its expectation from Shearson — and that is all that Phenix Federal is entitled to recover under the principal of general damages.[1] See *id.* The principle of general damages, then, does not allow Phenix Federal to recover any additional damages under the facts of this case.

[1] The court (correctly) submitted the damages issue on special interrogatories. This submission resulted in the general damages being broken into specific damage figures. However, a totalling of these specific figures still results in a total that constitutes general damages as provided for by law.

B. Collateral Source Rule

Further, the collateral source rule clearly does not provide Phenix a basis for a new trial in this action. In this case, actions were taken by the plaintiffs to mitigate damages by obtaining new funding for the plant. *See Iowa Power & Light Co. v. Board of Water Works Trustees*, 281 N.W.2d 827, 833 (Iowa Ct. App. 1979); *Nizzi v. Lavery Sprayers, Inc.*, 143 N.W.2d 312, 317-18 (Iowa 1966) (Iowa law requires parties to mitigate their damages). The result of these actions was the repayment of most of the contractual debt owed to Phenix.[2] *See* Sasser Testimony at 4969-70. Having been repaid $6.5 million, Phenix could not recover these funds a second time from VBCA or MTJ, the principal obligors, much less a second time from Shearson, a party who became liable to Phenix only because VBCA had initially defaulted on its promissory notes.[3] In short, through the bond issue Phenix has received $6.5 million in repayment of the contractual indebtedness owed to it and it is not entitled to a double recovery of these sums from any party, be it VBCA or Shearson. *See Team Central, Inc. v. Teamco*, 271 N.W.2d 914, 925 (Iowa 1978).

It is apparent that the facts here are a far cry from the cases in which the collateral source rule developed. That rule has

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[2] In its Brief, Phenix refers to the MTJ bond issue as a "loss spreading mechanism" instead of a repayment. Phenix Brief at 4. Phenix's characterization is just that, as the evidence demonstrated that Phenix received $6.5 million as a result of the bond issue. To refer to the receipt of this money as simply "loss spreading" is not an accurate reflection of the facts.

[3] As indicated, Shearson became liable to repay the debt to Phenix only as a result of the default of the primary obligors. It is black letter law that repayment of an obligation discharges a party secondarily liable to the extent of repayment. *Bledsoe v. Cargill, Inc.*, 452 So. 2d 1334 (Ala. Civ. App. 1984); *Industrial Investment Corp. v. Rocca*, 596 P.2d 100 (Idaho 1978), *appeal after remand*, 643 P.2d 1090 (1982); *Spencer v. American Advisory Corp.*, 338 So. 2d 62 (Fla. App. 1976), *cert. denied*, 348 So. 2d 953 (Fla. 1977). This is true whether the payment is made by the primary debtor or by a third party on behalf of the primary debtor. 38 C.J.S. Guaranty § 77 (1943); *see also Brunson Bonding & Insurance Agency, Inc. v. Floyd Electric Co.*, 416 So. 2d 558 (La. App. 1982). Moreover, because MTJ was a primary obligor it was not a collateral source and, hence, the collateral source rule could not be applicable to any funds received by Phenix from MTJ. *Huber, Hunt & Nichols, Inc. v. Moore*, 136 Cal. Rptr, 603, 619 (Cal. App. 1977).

generally been applied to payments received by personal injury claimants from insurance companies, which payments had been contracted for in advance, or from employers on a voluntary basis. As Dan Dobbs has noted in his treatise on remedies, the collateral source rule "finds its most common application in personal injury cases" and is intended to preserve the rights of subrogation and the benefits of insurance for those who have purchased coverage. D. Dobbs, *Handbook on the Law of Remedies*, § 3.5, at 185-86. Dobbs notes that the rule "is in fact retained less on the basis of the arguments [in its favor] than on the basis of its value in financing personal injury litigation." *Id.* § 8.10, at 584. The rule clearly has no application to the facts presented here for all of the reasons indicated.

[Material Omitted]